CONCLUSION

For the foregoing reasons and those set forth in Petitioner's Brief, this Court should grant the Petition for Certiorari and reverse the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

LAUREN ROBEL*
AVIVA ORENSTEIN
INDIANA UNIVERSITY
SCHOOL OF LAW
211 S. Indiana Ave.
Bloomington, IN 47405
(812) 855-8885

* Counsel of Record

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IN THE

Supreme Court of the United States

SARKES TARZIAN, INC.,

Petitioner,

v.

U.S. TRUST COMPANY OF FLORIDA SAVINGS BANK, as Personal Representative of the Estate of Mary Tarzian,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

OF COUNSEL:
JUDITH RESNIK
127 Wall Street
New Haven, CT 06511
(203) 432-1447

STEVEN M. EDWARDS*
PAUL B. SWEENEY
R. BRIAN BLACK
VICTORIA ZAYDMAN
HOGAN & HARTSON L.L.P.
875 Third Avenue
New York, NY 10022
(212) 918-3506

GREGORY G. GARRE
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5665
Counsel for Petitioner

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

The federal circuits are divided on the fundamental question of when a court may take away the power of a civil jury to disbelieve the testimony of interested witnesses. This question concerns the proper interpretation of Rule 50 of the Federal Rules of Civil Procedure and the scope of the Seventh Amendment right to a jury trial. This case provides an excellent opportunity for this Court to resolve the conflict and an opportunity, like *Unitherm Food Systems, Inc.* v. *Swift-Eckrich, Inc.*, No. 04-597 (to be argued Nov. 2, 2005), to instruct the lower federal courts on when the decision-making authority of juries must be respected.

A number of circuits have held that a jury may disbelieve the testimony of interested witnesses, even if it is uncontradicted and unimpeached. Other circuits have adopted a modified approach, sending cases to juries so long as an independent reason (such as circumstantial evidence, inconsistencies in the witnesses' testimony or exclusive access to the facts) exists to disbelieve interested witnesses. The Seventh Circuit, below, as well as two other circuits have held that a jury may not decide the credibility of interested witnesses that is "unrebutted" by direct evidence.

The straightforward facts of this case make it an excellent vehicle for confirming the role of the jury in determining the credibility of interested witnesses. An attorney representing respondent U.S. Trust negotiated an oral contract for the sale of stock to petitioner Sarkes Tarzian, Inc. ("STI"). At trial, STI presented circumstantial evidence that the attorney had actual authority to negotiate the contract. U.S. Trust then presented the testimony of its president and senior vice-president that the attorney did not have actual authority. The jury did not believe those witnesses and found in favor of STI. Even though the trial judge, who had observed the demeanor of the witnesses, denied U.S. Trust's Rule 50

motion for judgment as a matter of law, the Seventh Circuit overruled the trial judge and the jury in holding that the jury could not disbelieve the testimony of U.S. Trust's witnesses.

As explained by the amici law professors, just as this Court has in a series of decisions acted to protect the province of the jury in federal criminal cases, it is now imperative for the Court to make clear that appellate courts may not invade the constitutional province of federal civil juries to determine the credibility of interested witnesses.

I. THE DECISION IN THIS CASE DEEPENS THE CIRCUIT SPLIT ON WHEN A JURY MAY DISBELIEVE AN INTERESTED WITNESS.

As STI's petition explains, in *Reeves* v. *Sanderson Plumbing Products Inc.*, 530 U.S. 133, 150-51 (2000), this Court held that a trial court "may not make credibility determinations or weigh the evidence," but should give credence to "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence comes from *disinterested* witnesses." (Emphasis added.) Left open was the question of how judges should treat the testimony of interested witnesses. The decisions across the circuits represent points on a continuum with respect to this issue.

At one end are the Second, Third, Fifth, Eighth, Eleventh, and Federal Circuits, which have left it to the jury to decide whether to believe the testimony of interested witnesses, even if it is unrebutted by direct evidence.[1] At the other end of the continuum are the Fourth and Seventh Circuits (as exemplified by this case), which have taken cases away from juries on the basis of the testimony of interested witnesses

[1] *See* cases cited in petition ("Pet.") at 14-15. Under certain circumstances, the Federal Circuit may use the standards of other circuits, but its own standard is that the credibility of interested witnesses is for the jury to decide.

where that testimony is unrebutted by direct evidence.[2] After STI filed its petition, the Sixth Circuit joined the Fourth and Seventh Circuits by ruling that a district court could grant summary judgment based on the uncontroverted testimony of a defendant when the only other witness was deceased. *Burnette* v. *Gee*, No. 04-5551, 2005 WL 1513107, at *4-5 (6th Cir. June 21, 2005).

The First, Ninth, Tenth, and D.C. Circuits have taken a middle ground. They have held that a jury is not required to believe the testimony of interested witnesses under a variety of circumstances—such as when a witness's testimony is inconsistent with circumstantial evidence, the witness's testimony is itself inconsistent, or the issue concerns a matter that is exclusively within the control of the interested witness.[3] The approach of these courts incorporates factors that this Court has recognized as pertinent, although this Court has also stated that interest alone is sufficient to require submission of a witness's credibility to the jury.[4]

Respondent U.S. Trust has attempted to downplay the circuit conflict by suggesting that these decisions can be harmonized in various ways. Opp. at 4 & 6 n.2. But, as demonstrated in the petition, the split in the circuits is both real and outcome determinative—often in cases involving parallel fact patterns. Pet. at 18-19.[5] Furthermore, a similar

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[2] *Id.* at 15.

[3] *Id.* at 15-16.

[4] *Compare Chesapeake & O. Ry. Co.* v. *Martin*, 283 U.S. 209, 216 (1931), *with Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 626-28 (1944).

[5] *Also compare Fisher* v. *Am. Gen. Fin. Co.*, 52 Fed. Appx. 601, 608-09 (4th Cir. 2002) (per curiam) (vacating verdict on contractual bad faith claim and granting judgment as a matter of law based on unrebutted testimony of defendant's former manager that defendant had no motive to act in bad faith), *with Amsted Indus. Inc.* v. *Buckeye Steel Castings Co.*, 24 F.3d 178, 183 (Fed. Cir. 1994) (affirming denial of judgment as a matter of law on willful infringement despite engineering director's uncontradicted

split exists in connection with summary judgment motions. *Compare Corrugated Paper Prods., Inc.* v. *Longview Fibre Co.*, 868 F.2d 908, 914 (7th Cir. 1989) (defendant entitled to summary judgment where plaintiff did not "shake" defendant's version of the facts), *with Hill* v. *City of Scranton*, 411 F.3d 118, 129 n.16 & 131 n.22 (3d Cir. 2005) (citing *Reeves* and holding that "when evaluating a summary judgment motion a court should not consider even uncontradicted testimony of an interested witness where that testimony supports the movant").

In this case, STI offered substantial proof—albeit circumstantial—that U.S. Trust's attorney, James Pressly ("Pressly"), had actual authority to bind U.S. Trust, contrary to what U.S. Trust suggests. Opp. at 9. It was undisputed that Pressly was authorized "to negotiate a deal." Pet. at 26. It was undisputed that Pressly told STI "don't worry that Callaway is not here"; "I am here at your invitation to decisively make a deal today"; "I am authorized to make an offer"; "we'll take it" in response to STI's counter-offer; and "yes, we have a deal." *Id.* at 6-7. And it was undisputed that Pressly was authorized to make those statements. *Id.* at 7.[6]

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testimony that he copied upon good faith belief that patent invalid); *and Orix Credit Alliance, Inc.* v. *Taylor Machine Works, Inc.*, 125 F.3d 468, 475 (7th Cir. 1997) (affirming judgment as a matter of law based on uncontroverted testimony of agent and other employees of defendant that agent did not have authority), *with State Farm Mut. Auto. Ins. Co.* v. *Porter*, 186 F.2d 834, 843 (9th Cir. 1950) (affirming denial of judgment as a matter of law despite uncontroverted testimony of interested witness that wife took car without permission).

[6] U.S. Trust contends that STI had "to ask U.S. Trust, *before* claiming to have entered into a contract, whether Pressly was authorized to bind U.S. Trust." Opp. at 11 (emphasis original). While there may be a duty of inquiry in exceptional circumstances in cases involving *apparent* authority (discussed below), such a duty does not exist in cases involving *actual* authority. If that were so, then a third party could not rely on a formal grant of actual authority without checking with the principal.

In its case, U.S. Trust called its president Toby Callaway ("Callaway") and relied on the deposition of its vice-president Ann Cavanaugh ("Cavanaugh"), both of whom testified that Pressly did not have authority to bind U.S. Trust. Even though (1) Callaway and Cavanaugh were interested witnesses, (2) their testimony was inconsistent with Pressly's statements, (3) inconsistencies existed between the testimony of Callaway and Cavanaugh, and (4) both testified as to a private conversation that was exclusively within their control, the Seventh Circuit overruled the jury's verdict for STI on the ground that the testimony of Callaway and Cavanaugh allegedly stood "unrebutted". Pet. App. at 13a.

Even if U.S. Trust were correct (and it is not)[7] that nothing an agent says or does can "create" actual authority, Opp. at 12, the agent's statements are still *evidence* that a jury should be permitted to consider in determining whether actual authority existed. Any other rule would create the untenable proposition that in this area of the law, unlike any other, only one person—the principal—can testify to the facts. Moreover, such a rule would create an enormous incentive to lie—especially if, as the Seventh Circuit would have it, the jury is not permitted to judge the principal's credibility.

Under the "bright line" rule of the Second, Third, Fifth, Eighth, Eleventh, and Federal Circuits, as well as the "middle ground" approach of the First, Ninth, Tenth, and D.C. Circuits, the jury would have been permitted to weigh this circumstantial evidence in deciding whether Callaway and Cavanaugh were telling the truth. *See* Pet. at 16. The rule applicable in those circuits also would have permitted the jury to consider the inconsistencies and failures of recollection in their testimony in determining their credibility. *Id.* In addition, those circuits would have

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[7] As demonstrated in STI's petition, and acknowledged by the Seventh Circuit, the principal is bound by the authorized statements of the agent. Pet. at 25 & App. at 16a.

permitted the jury to consider the credibility of Callaway and Cavanaugh because the matters as to which they testified were exclusively within their control. *Id.* at 16-17.

U.S. Trust cites a summary judgment case, *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986), for the proposition that it does not make any difference whether the evidence is likely to be within the possession of the defendant so long as the plaintiff has had a full opportunity to conduct discovery. Opp. at 10. In *Anderson*, however, the Court was only making the point that a plaintiff cannot create an issue of fact "by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of a conspiracy or of legal malice." 477 U.S. at 256. In contrast here, STI presented record evidence, including Pressly's own statements, to prove Pressly's authority—and a jury credited that evidence.

U.S. Trust attempts to sidestep the conflict between the circuits by suggesting that this is a private dispute involving state law that is not worthy of the Court's attention. Opp. at 2, 5. The proper standard for assessing a jury verdict is an important issue of federal law, implicating both Rule 50 and the Seventh Amendment. *See Ellis* v. *Weasler Eng'g Inc.*, 258 F.3d 326, 336-37 (5th Cir.), *amended on other grounds by* 274 F.3d 881 (5th Cir. 2001); *City of Hobbs* v. *Hartford Fire Ins. Co.*, 162 F.3d 576, 581 (10th Cir. 1998). Further, because of the straightforward nature of the underlying transaction and because, as U.S. Trust notes, "no conflicting testimony" exists about what was said at the critical meeting between U.S. Trust and STI, Opp. at 3, this case presents an excellent vehicle for the Court to make clear that the legal standards applied by the Seventh, the Fourth, and now the Sixth Circuit are wrong.

II. THE COURT SHOULD CLARIFY THE OBLIGATION OF FEDERAL COURTS, SITTING IN DIVERSITY, TO APPLY SETTLED STATE LAW.

In addition to misapplying *Reeves* and wrongly invading the province of the jury, the Seventh Circuit abdicated its

obligation to apply state law when it did not overturn the trial court's refusal to instruct the jury on apparent authority. The issue is not, as U.S. Trust suggests, whether apparent authority can be created by the words or acts of the agent. Rather, at issue is whether, assuming there is authority—and U.S. Trust conceded that Pressly had authority to "negotiate a deal"—the principal bears the risk of an agent's failure to disclose any limitations on his authority. The highest court in New York has held that the principal (U.S. Trust) bears the risk of any failure by the agent (here, Pressly) "to reveal any restrictions" on the agent's authority. *Hallock* v. *State of New York*, 474 N.E.2d 1178, 1181-82 (N.Y. 1984).[8]

U.S. Trust attempts to distinguish *Hallock* on the ground that its rule applies only to attorneys entering into stipulations in open court. Opp. at 17. New York law, however is plain that *Hallock* applies to attorneys operating out of court,[9] as well as to instances that involve the apparent authority of non-attorney agents.[10]

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[8] The petition, at 26-27, cites many more cases, but they are not addressed by U.S. Trust.

[9] *See, e.g.*, *Morrison* v. *Budget Rent A Car Sys., Inc.*, 657 N.Y.S.2d 721, 723 (N.Y. App. Div. 1997) (citing *Hallock* and holding that attorney had apparent authority to enter into stipulation waiving affirmative defenses); *Sabo* v. *Evans*, 714 N.Y.S.2d 93, 94 (N.Y. App. Div. 2000) (to accept final mortgage payment); *Esquire Capital Corp.* v. *Motortech, Inc.*, 707 N.Y.S.2d 872, 872-73 (N.Y. App. Div. 2000) (to enter into escrow agreement or accept loan proceeds).

[10] *See, e.g.*, *Rocks & Jeans, Inc.* v. *Lakeview Auto Sales & Serv., Inc.*, 584 N.Y.S.2d 169, 170 (N.Y. App. Div. 1992) (car salesman). None of the other cases cited by U.S. Trust is on point. Opp. at 17. In *Fennell* v. *TLB Kent Co.*, 865 F.2d 498, 500 (2d Cir. 1989), the attorney had no authority. In *Berwin* v. *National R.R. Passenger Corp.*, 152 F.3d 917, 1998 WL 398803 (2d Cir. 1998) (unpublished table decision), the attorney had been fired. In *Gordon* v. *Town of Esopus*, 486 N.Y.S.2d 420, 421 (N.Y. App. Div. 1985), the attorney had no authority. While the intermediate court in *Gordon* distinguished *Hallock* on the ground that it involved a stipulation entered into in open court, other courts have

The Second Circuit also relied on *Hallock* in *Herbert Construction Co.* v. *Continental Insurance Co.*, 931 F.2d 989, 994, 996 (2d Cir. 1991), holding that no duty exists to inquire into the scope of the agent's authority in a business transaction and that "[t]he existence of apparent authority is a question of fact." U.S. Trust does not contend that *Herbert* does not accurately reflect New York law; rather, it attempts to avoid *Herbert* on the ground that the Second Circuit stated that a duty to inquire does exist where the transaction is "extraordinary". Opp. at 14. As the court in *Herbert* recognized, however, whether or not a transaction is "extraordinary" goes to whether or not the reliance on apparent authority was reasonable, and that is a question of fact for a jury to decide. 931 F.2d at 996.[11]

III. AT A MINIMUM, THE COURT SHOULD HOLD THIS CASE PENDING ITS DECISION IN *UNITHERM FOOD SYSTEMS*.

The Court recently granted certiorari in another case that involves the application of Rule 50 of the Federal Rules of Civil Procedure and that also raises issues of the appropriate role for appellate courts to take when reviewing evidence presented to a jury. *Unitherm Food Sys., Inc.* v. *Swift-Eckrich, Inc.*, No. 04-597 (to be argued November 2, 2005).[12]

This case parallels *Unitherm* in several respects. First, in this case, as in *Unitherm*, at issue is the stance that appellate courts should take when reviewing jury verdicts and

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not so limited *Hallock*, and the New York Court of Appeals has never done so.

[11] U.S. Trust's claim that the sale of stock in a closely held corporation is an "extraordinary" transaction for a large bank defies common sense and is unsupported by the record.

[12] The question in *Unitherm* is whether a court of appeals may review the sufficiency of the evidence supporting a jury verdict where the party requesting review made a motion for judgment as a matter of law under Rule 50(a) before the case was submitted to the jury, but failed to renew the motion after the jury's verdict.